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The legislative purpose in enacting ordinances or statutes regulating the manner of parking vehicles is strictly the court's conjecture in most cases, and the interpretation given more often than not appears to be one which will support the result the court desires. It is submitted that if the owner of an automobile is to be held liable to an injured party for the negligent operation of the vehicle by a thief or other unauthorized person, it is for the legislature to impose the liability by so stating in the ordinance or statute, or by making its intent implicitly clear. In the absence of a clear legislative purpose, the courts should absolve the owner of the automobile as a matter of law.

The dangerous instrumentality doctrine, raised by Judge Carroll's dissent, presents a unique contention for holding the owner liable. It is somewhat doubtful that the Florida courts would apply this doctrine in a factual situation as portrayed in the principal case,²³ but if the doctrine of imputed negligence is to be extended further to encompass those drivers using an automobile without authorization, this author is of the view that it is the legislature's responsibility, not the courts'.

PHILIP N. SMITH

DIVERSITY JURISDICTION—ADMISSIBILITY OF EVIDENCE AND THE "OUTCOME-DETERMINATIVE" TEST

The plaintiff-appellee, an assured under a fire insurance policy on Florida property, sued the defendant-appellant to recover for a fire loss. In a diversity action in a federal district court in Florida, the defendant tried to prove that during an examination (which occurred prior to the commencement of litigation), the plaintiff had sworn falsely with the intent to defraud. If admitted into evidence, the statement not only might have impeached the testimony of the corporate assured's president, but also could have constituted the defense of breach of policy.¹ The federal district judge refused to admit the statement into evidence on the basis

23. "When an owner *authorizes and permits* his automobile to be used by another he is liable in damages for injuries to third persons caused by the negligent operation so authorized." (Emphasis added.) *Lynch v. Walker*, 159 Fla. 188, 194, 31 So.2d 268, 271 (1947). See Judge Carroll's dissent in *Leonard v. Susco Car Rental Sys.*, 103 So.2d 243 (Fla. App. 1958), 13 U. MIAMI L. REV. 250.

1. *American Ins. Co. v. Robinson*, 120 Fla. 674, 163 So. 17 (1935); *Chaachou v. American Cent. Ins. Co.*, 241 F.2d 889 (5th Cir. 1957).

of a Florida statute² which excludes statements by a person whose property had been injured, when the person had not received a copy of the statement. On appeal, *held*, reversed: the general tendency under the federal rules favors the admission rather than the exclusion of evidence, and although a state exclusionary rule might appear to vary the result, the "outcome-determinative" test will not serve to exclude the evidence unless "all reasonable steps" have been taken to "overcome or ameliorate the consequences of the state rule." *Monarch Ins. Co. v. Spach*, 281 F.2d 401 (5th Cir. 1960).

In the classic case of *Erie R.R. v. Tompkins*,³ it was held that a federal court in diversity cases must follow the *substantive* law of the state in which it is sitting. However, rules of evidence are generally "thought of as procedural in the traditional conflict of laws sense,"⁴ and the federal forum will normally follow its own procedural rules.⁵ But, by the "outcome-determinative" test, an extension of the *Erie* doctrine, the federal court would follow the procedural rules of the *state* court if to do otherwise would affect the outcome of the case.⁶ In *Byrd v. Blue Ridge Rural Elec. Coop.*,⁷ the United States Supreme Court placed a limitation upon the "outcome-determinative" standard if the state rule were "merely a form and mode of enforcing" a state-created right, and was not "intended to be bound up with the definition of the rights and obligations of the parties."⁸ The reasoning of the court in the *Monarch* case was that the "outcome-determinative" test could not be applied unless it was "shown that operation of all of the Federal Rules substantially thwarts the Florida policy,"⁹ thereby engendering a different result. In the case at bar, the plaintiff was attempting to use the Florida statutory policy which the federal court interpreted as aimed at disclosure,¹⁰

2. FLA. STAT. § 92.33 (1959). "Every person who shall take a written statement by any injured person with respect to any . . . injury to person or property shall, at the time of taking such statement, furnish to the person making such statement a true and complete copy thereof . . . Any person having taken, or having possession of any written statement or a copy of such statement . . . shall, at the request of the person who made such statement . . . furnish the person . . . a true and complete copy thereof. No written statement by an injured person shall be admissible in evidence or otherwise used in any manner in any civil action relating to the subject matter thereof unless it shall be made to appear that a true and complete copy thereof was furnished to the person making such statement at the time of the making thereof . . . or . . . upon request of the person who made the statement. . . ."

3. 304 U.S. 64 (1938).

4. *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388, 393 n. 7 (5th Cir. 1961) citing *Monarch* as authority for this proposition.

5. *Monarch Ins. Co. v. Spach*, 281 F.2d 401 (5th Cir. 1960).

6. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

7. 356 U.S. 525 (1958).

8. *Id.* at 536.

9. *Monarch Ins. Co. v. Spach*, 281 F.2d 401, 413 (5th Cir. 1960).

10. The court interpreted the Florida statutory policy as aimed at the disclosure of statements made by one whose person or property has been injured, rather than serving the primary purpose of a penal statute to curb the unscrupulous practices of certain attorneys and insurance claim adjusters who do not furnish copies of statements made by injured persons to such persons at the time of taking or thereafter on demand.

as a means of concealing the evidence. The court reasoned that since the federal rules¹¹ could be used to achieve the Florida policy of disclosure, there was not necessarily a conflict between the Florida statute and Federal Rule 43(a).¹² Since the "outcome-determinative" test was inapplicable, the general rule favoring the admission rather than the exclusion of evidence was found to be controlling.¹³

The *Monarch* case therefore has placed an additional limitation on the "outcome-determinative" standard, in that unless it can be shown that all reasonable steps were taken to prevent the outcome of the case from being affected, it cannot be said that the "outcome-determinative" standard was violated.

One of the underlying factors behind this limitation, at least in regard to the admissibility of evidence, is evinced by the United States Supreme Court's statement in the *Blue Ridge* case:

The trial judge in the federal system has powers denied the judges of many States to comment on the weight of evidence and credibility of witnesses, and discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence.¹⁴

In addition to placing a further limitation on the "outcome-determinative" standard, the court expressed approval of the earlier federal decisions¹⁵ which held that the federal rule¹⁶ favoring admissibility of evidence should be followed, and "the fact that state courts would exclude the testimony does not necessarily require its exclusion by a United States District Court within such state."¹⁷

11. The court maintained that the plaintiff could have used Federal Rule 34 to discover the statement which was withheld by the defendant, rather than stand obstinately on the Florida exclusionary statute, as plaintiff did. *Monarch Ins. Co. v. Spach*, 281 F.2d 401, 413 (5th Cir. 1960).

12. Rule 43(a) reads: "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made." (Emphasis added.)

13. "In a federal court the rule, whether federal or state, which favors the reception of the evidence governs." *New York Life Ins. Co. v. Schlatter*, 203 F.2d 184, 188 (5th Cir. 1953) "If they are worth their salt, evidentiary rules are to aid the search for truth. Rule 43(a), notwithstanding its shortcomings, carries out that purpose by enabling federal courts to apply a liberal, flexible rule for the admissibility of evidence, unencumbered by common law archaisms." (Emphasis added.) *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388, 395 (5th Cir. 1961); see also the authorities cited in *Monarch Ins. Co. v. Spach*, 281 F.2d 401, 409, 410 (5th Cir. 1960).

14. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 540 (1958).

15. *Erie R.R. v. Lade*, 209 F.2d 948 (6th Cir. 1954); *New York Life Inc. Co. v. Schlatter*, 203 F.2d 184 (5th Cir. 1953); *Garford Trucking Corp. v. Mann*, 163 F.2d 71 (1st Cir. 1947); *Boerner v. United States*, 117 F.2d 387 (2d Cir. 1941).

16. See note 12 *supra*.

17. *Erie R.R. v. Lade*, 209 F.2d 948, 951 (6th Cir. 1954).

It appears that the federal courts are shifting from a policy of conformity of result between state and federal courts to a policy of promoting uniformity of procedure in the federal courts. Heretofore, the conformity of result between state and federal courts had been paramount, with the uniformity of federal procedure subordinated. Since *Blue Ridge* opened the door to exceptions, and since the principal case has placed an additional limitation upon the "outcome-determinative" standard, it is predicted that the "drastic logic"¹⁸ which has been employed to achieve conformity of outcome will be curtailed further by future federal decisions in order to achieve "uniformity within the whole federal judicial trial system."¹⁹

JEFF D. GAUTIER

PROCEDURE — RES JUDICATA — FAILURE TO BRING A COMPULSORY COUNTERCLAIM AGAINST A PERSON WHO COULD HAVE BEEN MADE A PARTY

A motorist's suit against both the driver and the owner (on a respondeat superior theory)¹ of another automobile for damages sustained in a collision was dismissed as to both defendants for the motorist's failure to assert a compulsory counterclaim² in a prior action on the same facts, in which the driver alone had sued the motorist for personal injuries. The prior action had resulted in a judicially approved settlement³ in the driver's favor, negotiated by the motorist's insurer. On appeal, *held*, affirmed: the owner, although absent in the prior action, "could have been made a party." Thus, the motorist was barred from bringing this subsequent action against the owner. *Pesce v. Linardo*, 123 So.2d 747 (Fla. App. 1960).

The bar for failure to assert a compulsory counterclaim seldom has been applied by the courts. This has been due partially to the

18. *Monarch Ins. Co. v. Spach*, 281 F.2d 401, 406 (5th Cir. 1960).

19. *Id.* at 408.

1. *Weber v. Porco*, 100 So.2d 146 (Fla. 1958) and cases cited therein are to the effect that an owner of an automobile is liable for the torts committed by anyone driving it with his express or implied permission. See also FLA. STAT. § 51.12 (1959).

2. FLA. R. CIV. P. 1.13 (1). *Compulsory Counterclaim*. "The defendant, at the time of the filing of his answer, shall state as a counterclaim, any claim, whether the subject of a pending action or not, which he has against the plaintiff, arising out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

3. FLA. STAT. § 45.02 (1959). A settlement in a minor's favor requires judicial approval.